FILED
MAY 15 1996
CLERK

No. 95-685

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ANHEUSER-BUSCH, INC. and
PENN ADVERTISING OF BALTIMORE, INC.,

Petitioners,

v.

MAYOR AND CITY COUNCIL OF BALTIMORE; KURT L. SCHMOKE, in his official capacity as Mayor of Baltimore City; CITY COUNCIL OF BALTIMORE CITY; and DAVID TANNER, in his official capacity as the General Superintendent of Zoning Administration and Enforcement,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

NEAL M. JANEY*
City Solicitor

BURTON H. LEVIN
Senior Solicitor

Law Department
City Hall, Room 107
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3940

Counsel for Respondents

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 3

TABLE OF AUTHORITIES

Page

CASES

Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 1

Florida Bar v. Went For It, Inc., 115 S.Ct. 2371 (1995) 2

44 Liquormart v. Rhode Island, ___ U.S. ___, No. 94-1140 (1996 WL 241709, decided May 13, 1996) 1, 2

Lawrence v. Chater, 116 S.Ct. 604 (1996) 1

Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, 478 U.S. 328 (1986) 1, 2

ARGUMENT

This supplemental brief in opposition is filed in light of *44 Liquormart, Inc. v. Rhode Island*, No. 94-1140 (1996 WL 241709, decided May 13, 1996). The decision in that case provides no proper occasion for entry here of a summary reconsideration order. The premises upon which the Fourth Circuit decided this case are not undercut by the rationale in any of the separate opinions in *44 Liquormart*. Remand for further consideration is not warranted. *See, Lawrence v. Chater*, 116 S.Ct. 604, 607 (1996) (*per curiam*).

Both factually and legally, the instant case is far removed from *44 Liquormart*. The Fourth Circuit did not rely on the flawed decision of the First Circuit, and indeed was openly sceptical of the rationale employed by that court. *Pet. App.* 17a-18a. In upholding Baltimore's limited restriction on the placement of billboards advertising alcohol, the Fourth Circuit placed no reliance on the 21st Amendment, nor the "greater includes the lesser" reasoning of *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 354-346 (1986), nor on the notion that speech jurisprudence includes a "vice exception." The Fourth Circuit's opinion adheres faithfully to *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557 (1980), which in the aftermath of *44 Liquormart* remains the standard binding on all lower courts.

The principal opinion in *44 Liquormart* teaches that " 'special care' should attend the review of . . . blanket bans" of commercial speech. *44 Liquormart*, 1996 WL 241709 *9, quoting *Central Hudson*, 447 U.S. at 566. Unlike

the blanket ban involved in *44 Liquormart*, the instant case involves a *limited* restriction on the location of billboards, and allows ample alternative means for *billboard* advertising. Thus, even with reference to the rationale of part V of the opinion authored by Justice Stevens, this is a case for application of less than strict review. The Fourth Circuit did, however, hold Baltimore to its burden of demonstrating beyond mere speculation and conjecture that its restriction would advance its concededly substantial purpose. The Fourth Circuit found that Baltimore met its burden by reference to studies showing a definite correlation between alcohol advertising and underage drinking, which is a method of proof endorsed by this Court. *Florida Bar v. Went For It, Inc.*, 115 S.Ct. 2371, 2378 (1995).

Unlike *44 Liquormart* and *Posadas*, this case does not involve a speech ban which screens from public view the underlying governmental policy. Baltimore's purpose is to reduce underage drinking. The most direct method to achieve that goal – banning the *sale* of alcohol to minors – has been tried without adequate success. Because Baltimore found, based on competent evidence, that a direct regulation of alcohol is insufficient to dampen demand by minors, its reasonably tailored and limited restriction on speech promoting alcohol is permissible. *Cf. 44 Liquormart*, 1996 WL 241709 *18 (Thomas, J., concurring in part and concurring in the judgment) and *19 (O'Connor, J., concurring in the judgment).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

NEAL M. JANEY*
City Solicitor

BURTON H. LEVIN
Senior Solicitor

Law Department
City Hall, Room 107
100 North Holliday Street
Baltimore, Maryland 21202
(410) 396-3940

Counsel for Respondents

*Counsel of Record